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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-5256

ROSALIE GIVENS, *et al.*,

Petitioners,

—against—

W. T. GRANT COMPANY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PETITION NOT PRINTED
REPLY BRIEF NOT PRINTED
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In the

Supreme Court of the United States

October Term 1972

No. 72-5256

Rosalie Givens, *et al.*,

Petitioners,

—against—

W. T. Grant Company,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Questions Presented

1. Is the decision of the Court of Appeals for the Second Circuit that it is a legal certainty that the plaintiffs are not entitled to an award of punitive damages under the law of the State of Connecticut in conflict with the applicable law of the State of Connecticut?

2. Is the test for determining the amount-in-controversy requirement of 28 U.S.C. §1332 the pecuniary loss to the defendant where the relief sought is that traditionally available at law?

3. Is the decision of the Court of Appeals for the Second Circuit that separate and distinct claims may not be aggregated in a class suit for purposes of satisfying the jurisdictional amount requirement of 28 U.S.C. §1332 in conflict with the applicable decisions of this Court?

Statement of the Case

The petitioners commenced this action in the Court of Common Pleas in the State of Connecticut on their own behalf and on behalf of a class purported to consist of all persons in the State of Connecticut who had entered into retail installment sales contracts with the respondent for the purchase of coupon books. The petitioners sought a declaratory judgment that the contracts in question were usurious and unconscionable; injunctions against respondent entering into further such contracts and from making collection on existing contracts; and actual and punitive damages, attorneys' fees and costs (Respondent's Appendix 9A-11A). The respondent removed the action to the United States District Court for the District of Connecticut. The District Court dismissed that portion of the complaint which alleged a class action. The petitioners sought and obtained leave to appeal to the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §1292, and Rule 5 Federal Rules of Civil Procedure. The Court of Appeals for the Second Circuit vacated the order of the District Court and dismissed the complaint for lack of subject matter jurisdiction on the ground that the matter in controversy, exclusive of interest and costs, did not exceed $10,000 (Petitioners' Appendix 1A).

The coupon plan which has been challenged in this case has been used by respondent since 1946 and is now in use in 43 states. Under the plan respondent sells books of coupons which the purchaser may exchange for merchandise at respondent's stores. Coupons are sold in books of $10, $15, $20, $25, $50, $100 and $200, which contain coupons of various denominations totalling those amounts. The respondent offers the coupon books at a "cash price" and a "time sale price". If the customer elects the "time sale price" he enters into a retail installment sales contract with the respondent for the purchase of the coupon book. Under the terms of the retail installment sales contract the customer agrees to pay the "time sale price" over a period of time ranging from 24 to 30 months. As the District Court said, petitioners "essentially claim that the contract constitutes a 'loan or forebearance'," (Pet. App. 13A) and is therefore subject to the usury laws of the State of Connecticut. The respondent's position is that the contract creates a bona fide sales transaction which is not subject to the usury laws.

ARGUMENT

I.

The decision below is in conformity with the applicable law of the State of Connecticut.

The court below held that under the law of the State of Connecticut it appeared to a legal certainty that none of the petitioners could recover punitive damages or attorneys' fees in an amount which exceeded $10,000. This holding was on two grounds: (1) the law of the State of Connecticut does not provide for such a recovery in a case such as that at bar; and (2) the petitioners' litigation expenses are minimal because they were represented by attorneys on the staff of the New Haven Legal Assistance Association, a non-profit organization funded by the federal government, the state government and private contributions.

In their petition the petitioners totally ignore the first ground of the holding of the court below; that is, that under the law of the State of Connecticut punitive damages or attorneys' fees are not recoverable in a case such as the case at bar. This ground of decision is dispositive of the issue raised by the petition for certiorari. Under the law of Connecticut punitive or exemplary damages are "limited to an amount which will serve to compensate the plaintiff to the extent of his expenses of litigation less taxable costs". *Triangle Sheet Metal Works, Inc.* v. *Silver,* 154 Conn. 116, 127, 222 A.2d 221, 225 (1966). Punitive damages include legal fees incurred by the plaintiff. *United Aircraft Corporation* v. *International Association of Machinists,* 161 Conn. 79, 106, 285 A.2d 330, 345 (1971); *Chykirda* v. *Yanosh,*

131 Conn. 565, 567, 41 A.2d 451, 452 (1945). However, the situations in which punitive damages may be awarded are very limited:

> The flavor of the basic requirement to justify an award of punitive or exemplary damages has been repeatedly described in terms of wanton and malicious injury, evil motive and violence. *Milwaukee & St. P. Ry. Co.* v. *Arms,* 91 U.S. 489, 493, 23 L. Ed. 374; *Denver & R. G. Ry.* v. *Harris,* 122 U.S. 597, 610, 7 S. Ct. 1286, 30 L. Ed. 1146; *Lake Shore & M.S. Ry. Co.* v. *Prentice,* 147 U.S. 101, 107, 13 S. Ct. 261, 37 L. Ed. 97; *Fay* v. *Parker,* 53 N.H. 342. The Restatement declares that punitive damages may be awarded only for "outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." Restatement, 4 Torts §908, comment (b).
>
> *Triangle Sheet Metal Works, Inc.* v. *Silver,* 154 Conn. at 128; 222 A.2d at 226.

The complaint in the case at bar does not contain any allegations of wanton or malicious conduct on the part of the defendant. (Res. App. 1A-11A) Therefore, under the law of the State of Connecticut there is no basis for an award of punitive damages.

Under the law of the State of Connecticut it is also possible to award attorneys' fees as such, as opposed to their inclusion in an award of punitive damages as part of a party's litigation expenses, but only pursuant to a contract or statutory authority. See *Triangle Sheet Metal Works* v. *Silver,* 154 Conn. at 119 and 127, 222 A.2d at 221 and 225. The complaint does not allege any contract providing for legal fees for the petitioners nor does it allege any statutory basis for an award of attorneys' fees.

In their petition the petitioners assert that they are entitled to an award of attorneys' fees under subsection 42-115e(b) of the Connecticut General Statutes (Pet. pg. 10). Section 42-115e provides in its entirety:

> *Injunction. Action by commissioner.* (a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction enjoining such practice under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, competition, actual confusion or misunderstanding or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.
>
> (b) The court in exceptional cases may award reasonable attorneys' fees to the prevailing party. Costs or attorneys' fees may be assessed against a defendant only if the court finds that he was wilfully engaged in a deceptive trade practice.
>
> (c) The commissioner of consumer protection shall, whenever he has reason to believe that any person has been violating any of the provisions of sections 42-115c to 42-115f, inclusive, or whenever proper evidence has been presented to said commissioner that any person has been violating any of the provisions of said sections, proceed against such person under the provisions of sections 42-112 and 42-113.
>
> (d) The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

Subsection 42-115e(b) provides for an award of attorneys' fees only in actions seeking injunctive relief against deceptive trade practices. An examination of the complaint,

however, discloses no evidence of reliance on subsection 42-115e(b). The complaint contains eleven prayers for relief but not one seeks injunctive relief against deceptive trade practices. Indeed the words "deceptive trade practice" do not appear in the complaint. Clearly, the petitioners have not stated, and did not intend to state, a cause of action under §42-115e. Moreover, even if the complaint was construed as seeking injunctive relief against deceptive trade practices, the petitioners still would not be entitled to an award of attorneys' fees under subsection 42-115e(b). That subsection is limited to "exceptional cases" where "the court finds that [the defendant] was wilfully engaged in a deceptive trade practice." There is no allegation any place in the complaint that the defendant was wilfully engaged in a deceptive trade practice. It should also be noted that even if the petitioners were entitled to recover legal fees under subsection 42-115e(b), that recovery would be limited to the fees incurred in connection with the prosecution of a claim under section 42-115e. They would not be entitled to the legal fees incurred in connection with the other claims in their petition. The legal fees incurred in connection with section 42-115e would then have to be apportioned among the twelve petitioners for purposes of determining whether the amount in controversy exceeds the sum of $10,000. *Snyder* v. *Harris*, 394 U.S. 332, 336-337 (1969), *Georgia Association of Independent Insurance Agents* v. *Travelers Indemnity Co.*, 313 F. Supp. 841, 844 (N.D. Ga. 1970). The decision of the court below that it is clear to a legal certainty that no single petitioner could recover legal fees approaching the sum of $10,000 is in conformity with the laws of the State of Connecticut.

II.

The decision below that the appropriate measure of the "matter-in-controversy" is the value of each petitioner's interest does not conflict with the decisions of this Court or any other circuit.

The general rule is that the plaintiff-viewpoint rule for determining the amount in controversy for jurisdictional purposes is applicable to actions seeking equitable relief as well as actions seeking relief traditionally available at law. *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121, 126 (1915). This is not an inflexible rule, however, "particularly where purely injunctive relief is sought, the amount in controversy may be measured by either the value of the right sought to be gained by the plaintiff • • • [or] the cost [of enforcing that right] to the defendant". *Tatum* v. *Laird*, 444 F.2d 947 at 951 (D.C. Circuit 1971). An excellent analysis of the then state of the law appears in footnote 10 on the same page. This analysis finds further support in the subsequent opinion of this Court in the case of *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). That case involved an attempt by the State of Illinois to enjoin four Wisconsin cities and two local sewer commissions from polluting Lake Michigan. In holding that the district court had original jurisdiction of the case under 28 U.S.C. §1331(a) this Court said:

> The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in §1331(a).
>
> 406 U.S. at 98

Thus while the general rule as to "matter-in-controversy" is the value of the plaintiff's interest, it is appropriate in

some cases, particularly those seeking primarily injunctive relief, to look at the object sought to be accomplished as disclosed by the plaintiff's complaint. There is no conflict among the circuits on this issue.

The petitioners assert in their petition that their "primary goal is to enjoin the respondent's coupon credit scheme as a public nuisance" (Pet. pg. 14). If that is their primary goal, their complaint does not disclose it. The prayer for relief relating to "public nuisance" is as follows:

> That the present conduct of the defendant in extracting interest rates greatly in excess of that allowed by the usury laws constitutes a public nuisance against all of the citizens of the State of Connecticut. [Res. App. 10A].

It is very significant that the petitioners do not even pray for an injunction. As the District Court found: "Plaintiffs essentially claim that the [coupon] contract constitutes a loan or forebearance." [Pet. App. 13A]. If the coupon contract is ultimately held to be a loan arrangement rather than a sales arrangement as claimed by the respondent, the installment sales contracts will be unenforceable under the laws of the State of Connecticut. Connecticut General Statutes §§37-4 and 37-8. That is this action seeks relief traditionally available at law. Indeed, as a practical matter the "public nuisance" claim adds nothing to the law suit. As the petitioners explicitly recognize at page 17 of their petition, if the coupon plan is held to violate the usury laws of the State of Connecticut, the respondent will either have to abandon the plan in Connecticut or revise it to comply with the state usury laws. The Court of Appeals was correct in looking to the value of each petitioner's interest to measure the matter-in-controversy.

III.

The decision of the court below that separate and distinct claims may not be aggregated in class suit to satisfy the "matter-in-controversy" requirement of 28 U.S.C. §1332 does not conflict with the decisions of this Court or any other circuit.

The petitioners assert at page 16 of their petition that because they seek injunctive relief their otherwise separate and distinct claims become joint and common. This is not the law of this Court or any other Circuit. *Snyder* v. *Harris,* 394 U.S. 332 (1969).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Complaint

To the Sheriff of the County of New Haven, His Deputy, or Constable of the Town of New Haven, Within Said County, Greetings:

By the Authority of the State of Connecticut, You are hereby commanded to summon the W.T. Grant Company, a foreign corporation organized and existing under the laws of the State of New York, and having places of business at 828 Chapel Street, New Haven, Connecticut, and 1245 Dixwell Avenue, Hamden, Connecticut, to appear before the Court of Common Pleas, to be held at New Haven, in and for the County of New Haven, on the Third Tuesday of March, 1971, said appearance to be made by an attorney for said corporation by filing a written statement of appearance with the Clerk of said Court on or before the second day following said return date, then and there to answer to Rosalie Givens, of 99 Edgewood Avenue, Town and County of New Haven, Gloria Norman, also known as Gloria Norman Williams, of 224 Newhall Street, Town and County of New Haven, Edward Thomas, of 107 Wooster Street, Apartment 3, Town and County of New Haven, Jessie and Daniel Barnes, of 41 Eastern Street, Town and County of New Haven, Lucille Hayes, of 250 Newhall Street, Town and County of New Haven, Robert Ursini, of 1082 Townsend Avenue, Town and County of New Haven, Lana Dixon, of 462 Shelton Avenue, Town and County of New Haven, Roscoe Morrison, of 13 English Street, Town and County of New Haven, Frances Biondi, of 256 James Street, Town and County of New Haven, Doris Giaimo, residing at 1315 State Street, Town and County of New Haven, and Joyce Kanoff, residing at 53 Quinnipiac Gardens, Town and County of New Haven, all in the State of Connecticut, suing

in their own behalf and in behalf of all other persons similarly situated, in a civil action wherein the plaintiffs complain and say:

FIRST COUNT

1. The defendant offers to the public several credit plans, among which are those called *Grant's Credit Plan—Retail Installment Sales Contract—New and Reopened,* and *Grant's Charge-It-Plan—Retail Installment Credit Contract—Add-On Account Only.* These credit plans are more commonly called "coupon contracts". All of the plaintiffs except Roscoe Morrison have contracted with the W.T. Grant Co. for said coupon contracts.

2. All of the plaintiffs except Morrison have signed contracts for the purchase of coupons which can be exchanged for merchandise only in a W.T. Grant Co. store, although said coupon books refer to other "Member Stores". The price of the coupons plus interest is paid to the W.T. Grant Co. in a specified number of monthly payments.

3. The coupons which were received by plaintiffs did not have to be spent on the same day on which they were purchased. Interest, however, was and is computed and charged not from the time purchases with the coupons were and are made, but from the time the contracts were and are signed. As a result, interest was and is collected by the W.T. Grant Co. before all coupons were or are redeemed by it.

4. None of the plaintiffs purchased goods or used all their coupons the day their contracts were signed.

5. Said contracts are a device or disguise used by defendant to evade the usury laws, and in reality the arrangement between plaintiffs and defendant is that of a loan or forbearance.

6. The rate of interest charged on each of these contracts is more than 12%, which is the maximum rate of interest permitted by Conn. Gen. Stats. §37-4. The defendant contracted with the plaintiff Kanoff at a 19.5% annual percentage rate; with the plaintiff Giaimo at an 18.5% annual percentage rate; with the plaintiff Thomas at a rate which is not specified on his contract, but which is estimated to be approximately 18.3%; with the plaintiff Ursini at a 19.90% annual percentage rate; with plaintiffs Barnes at annual percentage rates between 17.5% and 18.8%; with the plaintiff Biondi at an annual percentage rate which is not specified in her contract, but which is estimated to be approximately 20%; with the plaintiff Norman at a 19.90% annual percentage rate; and with the plaintiffs Givens, Dixon and Hayes, at annual percentage rates between 17.5% and 20.00%.

7. The defendant has demanded interest at a rate prohibited by Conn. Gen. Stat. §37-4.

SECOND COUNT

1. Paragraphs 1 and 2 of the first count are hereby made paragraphs 1 and 2 of this count as if fully pleaded herein.

3. The defendant, through its agents, fraudulently represented to plaintiffs Giaimo, Ursini, Thomas, Givens, Barnes, Biondi, and Hayes that they were signing a "typical charge account" contract, and were entering into a "typical charge account" arrangement.

4. The defendant, through its agents, fraudulently represented to plaintiffs Giaimo, Ursini, Thomas, Dixon, Givens, Barnes, Biondi, and Hayes that money was not due until purchases were made.

5. The defendant, through its agents, fraudulently represented to plaintiffs Giaimo, Ursini, Thomas, Dixon, Givens, Barnes, Biondi, Norman, and Hayes that interest would not be charged until purchases were made with said coupons.

6. The defendant, through its agents, fraudulently represented to plaintiffs Givens and Kanoff that the rate of interest on a coupon book contract would be less than that of alternative store charge plans.

7. The defendant, through its agents, fraudulently represented to plaintiff Givens that accident and health insurance, and life insurance were included in the price of the coupon contract, and was not a separate charge in said agreement.

8. The defendant, through its agents, fraudulently represented to plaintiff Ursini that it was store policy to require purchase of credit life insurance even if the customer had a life insurance policy currently in effect.

9. All of the plaintiffs except Morrison were not told that they were entering into a contractual relationship which obligated them to pay interest on the entire contractual balance before all coupons were redeemed by defendant, or at a rate different than the rate at which they used coupons in defendant's stores.

10. Said representation or representations or lack thereof were false and deceptive and were known by defendant to be false and deceptive and were made with the intent and for the purpose of inducing plaintiffs to enter into said agreements.

11. None of the plaintiffs were given an opportunity to read or were asked to read said coupon contracts before being asked to sign them by agents of defendants.

12. All of the plaintiffs except Morrison were induced by said representations to enter into said agreements, relied upon the truth of said representations when entering into said agreement, and were misled by said representations to their detriment.

THIRD COUNT

1. Paragraphs 1 and 2 of the first count are made paragraphs 1 and 2 of the third count as if fully pleaded therein.

3. According to the terms of their contracts the plaintiffs were obligated to pay for said coupons ("merchandise") even if they were lost or stolen without plaintiffs' fault or neglect.

4. Said contracts provide that the "buyer", if over 21 and married, represents having authority to bind his spouse to the terms of said agreements, even if said spouse is divorced or separated.

5. Said contracts require the plaintiffs to pay attorney's fees and court costs without regard to any fault or lack of fault of plaintiffs.

6. Said contracts require the plaintiffs to pay in advance for the privilege to purchase merchandise on credit terms.

7. Those contracts which are add-on contracts do not clearly present the amount of the additional finance charges to the customer.

8. Said agreements are deceptive, unfair, and unconscionable and violate §42a-1-203, §42a-2-302, 42-115a, and 42-115d, of the Conn. Gen. Statutes.

FOURTH COUNT

1. Plaintiffs Giaimo, Hayes, Thomas, Norman, were billed for credit life and credit accident and sickness insurance although they were not asked if they wanted either kind of insurance.

2. Plaintiff Ursini was told he had to purchase credit life insurance although he had life insurance currently in effect.

3. Plaintiffs Givens and Dixon were told that life, health and accident insurance was a benefit which was included in the price of their contracts.

4. None of the aforesaid plaintiffs received copies of their insurance policies within fifteen days as is required by §38-254 and §42-86 of the Connecticut General Statutes. They have never received copies of their insurance policies to the date of this complaint.

5. Said practice is deceptive, misleading, and unconscionable and violates §42a-1-203, §42a-2-302, 42-115a and 42-115 of the Connecticut General Statutes, as well as the aforementioned statutes.

Fifth Count

1. Defendant has loaned money to plaintiffs at a rate in excess of 12% and in sums less than $1800.00.

2. Defendant is in the business of making loans of money or credit as well as selling merchandise.

3. Defendant has failed to obtain a license from the banking commissioner as required by §36-225, et seq., of the Connecticut General Statutes.

4. Section 36-243 of the Connecticut General Statutes prohibits the enforcement of the loans made to plaintiffs by defendant.

Sixth Count

1. Paragraphs 1, 2, and 3 of the Fifth Count are made paragraphs 1, 2, and 3 of this Count, as if fully set out herein.

4. Defendant has reserved to itself a security interest in merchandise in its contracts with plaintiffs.

5. Said reservation of a security interest violates section 36-236 of the Connecticut General Statutes.

Seventh Count

1. Plaintiffs bring this count pursuant to §52-101-104 and -105 of the Connecticut General Statutes on behalf of themselves and all other persons similarly situated.

2. All plaintiffs except Morrison are members of a class of persons similarly situated, *as persons who have signed*

retail installment contracts with the defendant commonly called "coupon sales contracts."

3. The aforesaid class of all other persons similarly situated is a numerous class, the members of which are so numerous as to make joinder of its members as parties plaintiff impracticable.

4. The interests of the absent members of said class are adequately represented by the named plaintiffs, who have a common interest with all members of said class in obtaining relief from the unlawful and unconscionable contracts into which they have all entered.

5. Common legal and factual issues affecting all such contract holders are presented in this action by plaintiffs on their own behalf of all persons similarly situated.

6. A class action is proper because individual litigation of these same facts in numerous cases would be wasteful and expensive to the litigants and work an undue burden upon the Court and its calendar.

7. Court costs will also be kept within manageable limit by a single action on behalf of victimized consumers.

8. Many individual consumers in the class may be too poor to retain private counsel.

9. The claims are individually relatively small in amount, so that the claimants are unlikely to be motivated to seek redress although the claims are large in the aggregate.

10. The interests of justice favor consolidation of the matter as a class action.

11. Defendant, as more specifically alleged in the Second Count hereof, intends and has intended to deceive, induce and mislead, and in fact has deceived, mislead and induced substantial numbers of persons into signing agreements similar to those signed by plaintiffs. Unless enjoined by order of this Court, defendant will continue to engage in such false and misleading conduct, causing irreparable injury to the named plaintiffs and to the class of persons they represent.

12. Defendant has violated the usury laws of the State of Connecticut in each and every contract entered into with a member of the aforesaid class.

13. Common relief is sought herein by plaintiffs on their own behalf and on behalf of all others similarly situated, as more particularly set forth in the prayer of this complaint.

14. There are actual bonafide and substantial questions and issues in dispute between the parties, and substantial uncertainties of legal relations which require settlement and judicial determination.

The plaintiffs pray for the following relief:

1. That pursuant to Conn. Gen. Stats. §52-29, a declaratory judgment be entered that defendant's contracts with plaintiffs are usurious and therefore void.

2. A declaratory judgment that said agreements are unconscionable, and therefore void.

3. That a permanent injunction be entered enjoining and restraining the defendant from entering into contracts which involve the use of coupons or other similar devices which deceive the average consumer.

4. An injunction ordering defendant to serve a copy of any judgment herein on all persons who have entered into said agreements and upon any finance companies or others to which any of said agreements were assigned.

5. That the present conduct of the defendant in extracting interest rates greatly in excess of that allowed by the usury laws constitutes a public nuisance against all of the citizens of the State of Connecticut.

6. That, pursuant to its equitable powers, this court enjoin and restrain the W.T. Grant Co. from making any further collections on any contracts for the sale and use of coupons entered into in the State of Connecticut.

7. Damages as to each named plaintiff in the sum of all amounts paid to defendant pursuant to each agreement.

8. $15,000.00 punitive damages as to each named plaintiff.

9. Costs.

10. Reasonable attorney's fees.

11. Such other and further relief as the Court deems just.

Frederick W. Danforth, Jr., of New Haven, is recognized in the sum of $125.00 to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Dated at New Haven this 16th day of February, 1971.

.....

Commissioner of the Supreme Court

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GIVENS ET AL. *v.* W. T. GRANT CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-5256. Decided November 13, 1972

Certiorari granted; 457 F. 2d 612, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for reconsideration of its order of dismissal in light of 28 U. S. C. § 1447 (c).